SUPREME COURT, U.S.

RECORD APPENDIX

FILED
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Supreme Court of the United States

October Term, 1967

No. 127

READING COMPANY, *Petitioner*

v.

FRANCIS SHUNK BROWN, 3RD, etc., et al.

THOMAS RAEBURN WHITE, JR.
MICHAEL H. MALIN
H. MERLE MULLOY
THEODORE W. FLOWERS
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1900 Land Title Bldg.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 4, 1967
CERTIORARI GRANTED OCTOBER 16, 1967

Supreme Court of the United States

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT

1962		
Nov.	16	Debtor's Petition for Arrangement under Chapter XI, List of Creditors, Statement of Assets and Liabilities, and Affidavit for and Order extending time for filing Schedules, etc., filed.
	16	Referred to Thomas J. Curtin, Referee.
	16	Petition and Order appointing Francis Shunk Brown, III, as Receiver, with leave to operate the business, filed. (Bond $5,000)
	19	Bond of receiver in $5,000 with Fidelity & Deposit Co. of Maryland as surety, approved and filed.
	20	Petition and Order authorizing receiver to employ Samuel Marx, Esq., as counsel, filed.
	21	Affidavit of mailing notices, filed.
	21	Order confirming appointment of receiver, etc., filed.
Dec.	6	Schedules and Statement of Affairs, filed.
	12	Petition of receiver for appointment of appraiser, filed.
1964		
Oct.	9	Referee's certificate for review, filed.
1965		
Feb.	26	Argued sur Referee's certificate for review.
June	4	Trustee's brief, filed.
	4	Brief of Reading Co., filed.

	4	Memorandum of law of U.S., filed.
	4	Reply brief of Reading Co., filed.
	9	Memorandum, Van Dusen, J. and Order that the petition of Reading Co. for review, certified by referee's certificate for review is DENIED, and AFFIRMING order of 9-30-64 of referee, filed. 6-10-65 entered and notice mailed.
July	1	Notice of Appeal by Reading Company, Claimant, from Judge Van Dusen's Order of 6/9/65, filed. (Copies mailed to Arthur E. Newbold, III, Samuel Marx, and Drew J. T. O'Keefe)
	1	Copy of notice to Clerk, U.S. Court of Appeals, filed.
	1	Bond of Reading Company for costs on appeal in the sum of $250.00 (cash), filed.
	20	Record transmitted to U.S. Court of Appeals.

1965 COURT OF APPEALS

Aug.	13	Stipulation extending time for furnishing Statement of contents of Appendix to August 30, 1965; and for filing and serving brief and appendix for appellant to October 4, 1965, filed. Approved.
Sept.	27	Stipulation extending time for filing and serving appellant's brief and appendix to November 4, 1965, filed. Approved.
Nov.	2	Stipulation extending time for filing and serving appellant's brief and appendix to January 4, 1966, filed. Approved.
1966		
Jan.	3	Brief and appendix for appellant, filed.
Feb.	4	Stipulation extending time for filing and serving appellee's (Francis Shunk Brown, III) brief and appendix to March 7, 1966, filed. Approved.

	11	Stipulation extending time (out of time) for filing and serving appellee's (United States) brief to March 7, 1966, filed. Approved.
Mar.	4	Motion to extend time for filing and serving printed brief for appellee—United States to Mar. 22, 1966 (with typewritten copies to be served by Mar. 14, 1966), filed. Certificate of service attached. Granted.
1967		
Jan.	6	Opinion on rehearing (Staley, Chief Judge and McLaughlin, *Kalodner*, Hastie, Smith, Freedman and Seitz, Circuit Judges, with *Freedman*, Circuit Judge, dissenting and *Smith* and *Seitz*, Circuit Judges concurring in the dissent), filed.
	6	Judgment affirming the judgment of the District Court, filed June 9, 1965, filed.
	20	Petition for rehearing by appellant, filed.
Feb.	13	Order (Staley, Chief Judge, and McLaughlin, *Kalodner*, Hastie, Smith, Freedman and Seitz, Circuit Judges) denying appellant's petition for rehearing, filed.
Apr.	10	Certified judgment in lieu of formal mandate issued.

PROOF OF CLAIM

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chapter XI No. 27540, In Bankruptcy

In the Matter of

I. J. KNIGHT REALTY CORPORATION

Debtor-Bankrupt

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

B. Howarth, of Philadelphia, in the County of Philadelphia, State of Pennsylvania, being duly sworn, deposes and says:

(C) That he is the Secretary of READING COMPANY, a corporation organized and existing under the Laws of the State of Pennsylvania, and carrying on business at 12th and Market Streets, Philadelphia County of Philadelphia, State of Pennsylvania, and is duly authorized to make this proof of claim on its behalf;

1. That I. J. Knight Realty Corporation, the above-named bankrupt (debtor), was at and before the filing by (or against) it of the petition for adjudication of bankruptcy, and still is, justly and truly indebted (or liable) to said corporation in the sum of Five hundred fifty-nine thousand seven hundred thirty and 83/100 dollars,

2. That the consideration of said debt (or liability) is as follows:
Damage to claimant as set forth in Statement of Claim attached hereto.

3. That no part of said debt (or liability) has been paid,

4. That there are no set-offs or counter-claims to said debt (or liability).

5. That said claimant does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt (or liability).

6. Claim is for administrative expenses due to negligence of the Receiver in operation of business of the debtor. See Statement attached.

7. That your deponent hereby authorizes W. Wilson White and/or Michael H. Malin to attend any and all meetings of creditors of the bankrupt (or debtor) aforesaid, for and in the name of the undersigned, to vote for or against any proposal or resolution that may then be submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankrupt (or debtor); and for the undersigned to assent to such appointment of trustees; also to accept any composition proposed by said bankrupt (or debtor) in satisfaction of his debts, and to receive payment of dividends, and of money due the undersigned under any composition; and for any other purpose in the undersigned's interest whatsoever, with full power of substitution.

READING COMPANY

By B. HOWARTH,
Secretary

Subscribed and sworn to before me this 1st day of April, 1963.

ARTHUR H. WILLIAMS

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires January 17, 1965

[Seal]

STATEMENT OF CLAIM FOR DAMAGES CAUSED BY NEGLIGENCE OF RECEIVER

1. Claimant is Reading Company, a Pennsylvania corporation and a common carrier, with its main terminal and principal place of business at the Reading Terminal Building, 12th and Market Streets, Philadelphia, Pennsylvania.

2. Claimant, Reading Company, was, on January 1, 1963, the owner of real and personal property in the vicinity of 10th and Diamond Streets, Philadelphia, Pennsylvania, which property consisted of a railroad signal tower and railroad right of way with rails, ties, switches and related equipment, by means of which the Reading Company transported persons and property to and from the Reading Terminal to various points in and out of Philadelphia, and which property was destroyed and damaged by fire on January 1, 1963, forcing Reading Company to curtail these operations from 5:15 p.m. on January 1, to 6:00 p.m. on January 7, 1963. The damage to the claimant resulted from the acts and omissions hereinafter set forth.

3. The defendant in this claim is Francis Shunk Brown, III, Receiver of the debtor corporation, who was appointed such Receiver and given leave to operate the business of the debtor corporation by order of this Court entered November 16, 1962; and who in such capacity was in exclusive custody and control of the Fretz Building, a rental property located at 10th and Diamond Streets, in the City of Philadelphia, which was the principal asset of the debtor corporation.

4. By virtue of the terms of §959(b) of the Judicial Code (28 U.S.C. §959(b)), said Receiver was required to manage and operate the property in his possession as Receiver according to the requirements of the valid laws of Pennsylvania, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

5. On January 1, 1963, a twelve-alarm fire, characterized as the biggest in the history of Philadelphia, occurred in the Fretz Building. The first started because of, and was caused by, the negligence of the Receiver and the negligence of the Receiver's agents, servants and employees. The fire was caused and permitted to spread far beyond its normal confines by and through the negligence of the Receiver and his agents, servants and employees. The fire destroyed and damaged all the property of persons who were tenants of the building. It spread to such an extent beyond its normal confines as to destroy and damage real and personal property adjoining and in the immediate neighborhood, including buildings and their contents, railroad tracks, equipment and appurtenances, and railroad cars and vehicles in the vicinity, together with their contents. It required the City of Philadelphia to engage in emergency demolition of damaged properties for the protection of the public. The circumstances leading to the starting of this fire and to its spreading beyond control are hereinafter set forth in detail.

6. On December 31, 1962 and January 1, 1963, the Philadelphia area was subjected to weather conditions which caused high winds and sub-freezing temperatures, with the temperature at times being only a few degrees above zero degrees Fahrenheit. These conditions, however, were not extraordinary.

7. The Receiver did not take adequate measures to repair drafty doors and windows in the Fretz Building so that it would not be so cold as to cause the freezing of the sprinkler system in the building and its being rendered inoperative.

8. The Receiver did not instruct nor require George Benezet, his servant, agent and employee, employed by him as Chief Engineer of the Fretz Building, to keep the heat in the building sufficiently high on the days December 29, 30, and 31, 1962, so that the sprinkler system of the building would not freeze solid and be rendered inoperative.

9. On December 31, 1962 and January 1, 1963, the sprinkler system of the Fretz Building was frozen solid because of the cold in the building and was therefore rendered inoperative. The cold was due both to failure to heat the building to the greatest extent possible and to the drafty condition of the windows and doors of the building. This sprinkler system, like all sprinkler systems, was designed to emit water at the time of the occurrence of a localized fire in the building and thereby quench it and prevent its spread. The debtor corporation and its Receiver were required by ordinance and regulation of the City of Philadelphia, particularly §5-1403 of the Fire Code, as well as by ordinary prudence, to have said sprinkler system maintained in operative condition at all times.

10. George Benezet, the said Chief Engineer of the Fretz Building, on December 31, 1962, turned off the sprinkler system for repairs to frozen and burst pipes, and left it off on January 1, 1963, in an unrepaired and inoperative condition.

11. The Receiver did not take any required measures to insure that the sprinkler system of the Fretz Building would be restored promptly to working condition.

12. Neither George Benezet nor any other agent, servant or employee of the Receiver nor the Receiver himself, notified the Philadelphia City Fire Department that the sprinkler system was turned off, which notice is required by §5-1403 of the Philadelphia Fire Code.

13. The fire which began in the Fretz Building would not have spread and would not have caused the widespread damage that it did cause had the sprinkler system of the building been operative.

14. The Receiver did not post a fire watch in the Fretz Building on December 31, 1962 and January 1, 1963, even though it was then without sprinkler protection, and even though the Receiver knew, or should have known, that the

Fretz Building was entirely wooden in its interior, that there were two fuel oil service businesses near the Fretz Building storing large quantities of flammable oil, and that the Fretz Building was entirely surrounded by dwellings which were much smaller than it and which would be subjected not only to a shower of sparks and burning material from a burning building of such relative height but to total destruction from falling walls, and that the tracks of a railroad heavily travelled by citizens of Philadelphia was alongside the building and would be subjected to damage and resultant injury to the public if a fire in the Fretz Building should start and be permitted to spread.

15. During the evening of December 31, 1962, the said George Benezet, the Receiver's agent, servant and employee, was working to turn off all of the water valves which fed the defunct sprinkler system in the Fretz Building. At or about 8:00 p.m. on December 31, 1962, George Benezet, along with one John Abel, went up to an area of the Fretz Building which was known as the "C" Building, or water tower area, on the eighth floor of the building, and there, for the purpose of providing heat and light while working on the water valves, George Benezet made a dangerous electrical connection of a test socket to a high voltage, high amperage elevator control switchbox located in the area, by connecting one lead of the test socket to a knife switch and the other to the handle of the switchbox, thereby by-passing the safety fusing and setting up an electrical circuit which would continue to generate an uncontrolled heat and current flow until it caused arcing in gaps and flames in all lines, including a line to an electric heater which Benezet and Abel left operative and connected to the aforesaid dangerous connection when they departed from the eighth floor of the Fretz Building at or about 11:00 p.m. on December 31, 1962.

16. The circuit as hooked up by George Benezet was dangerous and was known by him to be dangerous. It caused intense heat in the electrical lines running from the base-

ment of the building to the eighth floor, and the heat grew in intensity from 11:00 p.m. on December 31, 1962 until it caused the fire on January 1, 1963, at or about 5:00 p.m.

17. The circuit as hooked up by George Benezet caused intense heat in the switchbox and in the cords running along the floor to the electric heater, generating heat until it burned through its insulation and heated everything around it to its kindling point. The construction of the building at this point was such that a two-foot deep areaway under the floor had a chimney-like effect which channeled and concentrated the high winds which spread the fire rapidly through the remaining portions of the building. These high winds rushed into the building through the drafty and missing windows on the eighth floor of the Fretz Building.

18. The heat generated by the dangerous electrical hookup was at its maximum at the elevator switchbox area of the Fretz Building but was prevalent along the entire electrical feed-in line with heat in intensity proportionate to nearness to the elevator switchbox. The hot feed-in wires caused fires on floors touched by the electrical feed-in lines, which fires were fed by air rushing at first through the drafty and missing windows and then by air surging in through windows broken by the fire, heat and pressure.

19. The wooden condition of the building, the intensely hot electrical fire, and the drafty condition of the building which fanned the initial flames, caused the fire to spread rapidly among the tons of combustible materials on the eighth floor and on the other floors beneath, until the fire, which was visible ten miles away, developed into a white hot fire storm of such intense heat that it ignited, by radiation alone, dwellings across the street from it and melted and warped the Reading Company's adjacent signal tower and rails and reduced its rail ties to ashes and threatened a general conflagration of disastrous proportions before it was finally brought under control by the maximum efforts

of five hundred eighty-six firemen and fifty-six fire companies.

20. The Receiver was responsible for this disaster and was negligent both through his own action and failure to act as Receiver and through the acts and failure to act of his agents, servants and employees:

a. in causing this fire to start;

b. in permitting its spread from the water tower area to other parts of the building and to other buildings and properties;

c. in failing to insure that the sprinkler system had been filled with an anti-freeze solution so that it would not freeze up and would remain operative even in cold weather;

d. in allowing the sprinkler system to become inoperative;

e. in failing to notify the Fire Department that the sprinkler system was inoperative;

f. in failing to take measures to restore the sprinkler system promptly;

g. in failing to post a fire watch in a building without fire protection;

h. in making a dangerous electrical connection;

i. in failing to turn off a dangerous electrical connection;

j. in failing to heat the Fretz Building adequately;

k. in failing to maintain the Fretz Building properly;

l. in failing to hire competent maintenance personnel;

m. in failing to instruct George Benezet not to make electrical connections which he was not qualified to make;

n. in failing to take measures to prevent the building from being unnecessarily drafty and therefore capable of supplying air for any embryonic fires that might start in the building;

o. in failing to take the precautions which would have been required of a reasonable man knowing that the building was drafty, that its interior was largely wood, that it was without sprinkler protection, in an area known as a fire risk area, and which housed an industrial complex with huge amounts of combustible materials.

For the above reasons, the above named claimant asks damages in the sum of Five hundred fifty-nine thousand seven hundred thirty and 83/100 Dollars, an itemized account of which is attached, and further asks that this claim be treated and allowed as a claim for administrative expenses.

WHITE & WILLIAMS
Counsel for Claimant

By W. WILSON WHITE

ITEMIZED ACCOUNT OF DAMAGES OF READING COMPANY

ITEM 1. DAMAGE TO READING COMPANY PROPERTY

(a) Tower building, with communication and interlocking equipment		$164,350.00
(b) Remove tower building		750.00
(c) Bridge 2/41—Fence, railings, walks		6,837.00
(d) Communication facilities		187.00
(e) Catenary and electrical system		32,052.00
(f) Track		89,776.00
(g) Signal facilities		158,281.83
(h) Engineering and supervision		11,450.00
(i) Train Describer System		12,000.00
		$475,683.83
Less estimated salvage		30,983.00
		$444,700.83

ITEM 2. EXPENSES INCURRED

Expense of crane used at fire scene for clearing damage and restoring track and catenaries (Port Richmond Terminal Expense):		
Labor	$1,513.86	
Crane Expense	3,842.59	
		$ 5,356.45
Operating Expenses — Philadelphia Division:		
a. Flagman at fire scene for 8⅓ days	$1,663.50	
b. Work trains, wire trains, engine changes	3,234.50	
c. McMyler Crane and Crew	313.87	
d. Crew and two extra yardmasters required at West Falls by reason of detour	171.78	
e. Extra crews and overtime at Reading Terminal	1,197.53	
f. Overtime for stationmasters, gatemen, train callers, baggagemen and clerks	1,912.00	

g. Extra men and overtime at towers	572.45	
h. Personal expenses of supervision	650.00	
		9,715.63
Operating Expenses—Reading and Shamokin Divisions:		
a. Engine crew allowance for detour move at Norristown—Jan. 1 through Jan. 6	64.80	
b. Crew expense in movement of light engine from Reading to Philadelphia on Jan. 1, 1963	77.23	
c. Change of crews at Shamokin on Train No. 97 on Jan. 1 as a result of Hours of Service Law	44.23	
d. Personal expenses of supervision	55.30	
		241.56
Police Department—Expense of police protection for passengers at detour points and policing fire scene		473.60
Motive Power Department:		
Erie Avenue Engine House. Wreckmaster supervised the use of self-propelled Diesel cranes from Port Richmond Terminal, taking up old rail affected by the fire; removing catenary structure and cleaning up the debris fallen on the railroad from the fire-damaged adjacent building	403.18	
Derrick Engineer using Relief train truck No. R-100 removing damaged catenary structure	57.99	
Port Richmond Car Shop. Assistant Foreman and Car Inspectors—Traveling and preparing damaged cars for removal	441.46	

Reading Terminal Carmen. Due to extra (shuttle) trains terminating at North Broad Street Station (caused by fire preventing full traffic to the Terminal), employees were sent to that point to inspect and service coaches, resulting in overtime charges to extent of..... 1,327.96

Huntingdon Street Car Shop. Car Inspectors, Electricians and Coach Cleaners worked at North Broad Street Station, 16th St. Junction and Wayne Junction Passenger Station, servicing extra (shuttle) trains—overtime 711.39

Wayne Junction Electric Car Shop. Employees were sent to outlying points to make running repairs and monthly inspections while cars were lying over at those points (prevented from being placed for attention at Car Shop) 4,369.70

Personal Expenses — Supervisory Personnel 170.12

7,481.80

The following expenses result from unloading cars at 5th & Willow Sts. Yard because of inability to transport beyond fire scene:

LLNX	4556—	Claim	340948-2...	$2,058.54
SUCX	230—	"	340949-2...	2,270.94
GEPX	1680—	"	341008-2...	1,824.50
URTX	67050—	"	341009-2...	1,490.69
HFPX	175—	"	341324-2...	1,021.42
URTX	67401—	"	341328-2...	1,468.89
LLNX	4522—	"	341323-2...	1,085.73
ART	91658—	"	341326-2...	729.03
URTX	60431—	"	341325-2...	829.32
NX	3149—	"	341327-2...	1,341.03
MNX	1855—	"	341329-2...	897.49

15,017.58

Cost of chartering buses to move passengers around fire scene:			
Philadelphia Transportation Co.	$4,311.00		
Reading Transportation Co.	2,671.25		
Merz Tours	917.50		
Auch Interborough	98.00		
Public Service	130.50		
Personal expenses	73.51		
		8,401.76	
			46,687.38

ITEM 3. DAMAGE TO CARS AND MERCHANDISE

Fire Damage to Freight Cars:			
URTX 69367—Destroyed	$7,500.00		
NX 1639—Damaged	175.00		
SHPX 20491—Damaged	225.00		
UP 125597—Damaged	450.00		
		8,350.00	
Merchandise in Freight Cars:			
Formal claims for fire damage to merchandise in cars received as follows:			
URTX 69367—Claim 339932-2	$8,507.29		
NX 1647— " 340944-2	2,388.54		
NX 1639— " 340945-2	2,492.86		
KGNX 3508— " 340946-2	2,331.69		
KGNX 3804, KGNX 3816 — " 340947-2	4,480.88		
		20,201.26	
			28,551.26

ITEM 4. PASSENGER DEPARTMENT LOSSES AND EXPENSES

Estimated revenue loss through service interruption Jan. 2 to 6, 1963, inclusive	$ 30,753.00		
Estimated revenue loss for period Jan. 7 to 11, inclusive	8,425.00		
Additional expenses	612.36		
			39,790.36
TOTAL			$559,730.83

PETITION TO EXPUNGE CLAIM

To the Honorable Thomas J. Curtin, Referee in Bankruptcy:
The Petition of FRANCIS SHUNK BROWN, 3rd, respectfully represents:

1. That he is the Trustee, duly qualified and acting.

2. That Claim #21 was filed by the Reading Company in the amount of $339,730.83.

3. That said claim was asserted to be a claim for administration expense due to the alleged negligence of the Receiver in the operation of the business of the Debtor in Chapter XI proceedings.

4. Your petitioner avers that said claim is not an administration expense inasmuch as it was not one of the actual and necessary costs and expenses incurred by officers other than the Referee in the administration of estates . . .", and hence, is not a cost of administration under Section 62(a)1 of the Bankruptcy Act.

WHEREFORE, your petitioner prays that the claim of the Reading Company be expunged, and that your petitioner have such other and further relief as is just.

/s/ FRANCIS SHUNK BROWN, 3RD

TRANSCRIPT OF SPECIAL MEETING OF CREDITORS

to Expunge Claim #21

Objection to Claims 14 and 160.

THE REFEREE: There has been filed by the Receiver-Trustee, because he has since become the trustee in bankruptcy a motion to expunge the claim.

Now, basically the motion to expunge alleges that the claim, asserted to be for administration expenses, is not an administration expense inasmuch as it was not one of the actual and necessary costs, and expenses incurred by officers other than the Referee in the administration of the estate—quoting Section 62-A-1 of the Bankruptcy Act, and, of course, that brings in question Section 64-A-1 also.

I understand that counsel for the Receiver-Trustee does not admit or accept the question of negligence, except for this particular hearing he states: Even if there was negligence it is still not an administration expense. Is that correctly stated so far?

MR. SHARKEY: Yes, sir.

MR. WHITE: Yes sir.

THE REFEREE: It would appear to me there is no factual question before the Referee. I think there should be a case stated and then briefs should be filed on the particular points. Hold them for a while. We have nothing before us except my direction which, of course, Mr. White is familiar with. I am proceeding like we did in Transport Clearings. We had there 162 different trucking outfits and we made one test case, and we are proceeding under the same theory. I think it is the only logical way. I think we have 150 claimants here also, and the same proposition of law is going to govern everyone; namely, if it is not an administration ex-

pense, of course, then it is not to be considered in this particular case. I believe that comes down almost basically to what we are going to go through here.

Now, I understand the Government wishes to be heard on this, because I think they come into the same category, as they are making the contention that if you come in as an administration expense, by virtue of priority, Section 64, it would, of course, push them back. And the same thing would happen to all the general claimants who are here, who have taken the same position, and if there are any wage claimants, of course, they would take the same position.

I also understand that Mr. Brown, representing the stockholders, also would be in the same position, because, naturally, if there is any overage it must go back to the stockholders. So I mean, you are going to be opposed by quite a few creditors in different categories. I think that the most orderly way to handle it would be to prepare a case stated within a certain period of time and have it framed, and anyone who does not like the Referee's ruling, of course, they would have the usual 10 days to file a certificate of review and proceed forward on it. Then, again, everyone should have an opportunity to file briefs in this matter.

Now, if you want to consult with your other counsel, you may. I think since it is your case, that is a matter for you to decide yourself. In other words, as far as this is concerned, while it is a test case it must, of course, be run by Mr. White who is the claimant here, namely, representing the claimant, The Reading Railroad.

MR. MARCU: Inasmuch as there are a number of claimants in this category, is it necessary for them all to join in Mr. White's claim or may they abide by the decision without joining in?

THE REFEREE: No, I have ruled. This will be the key or test case. When it is finally decided—because there is no

question about it—no one is going to be satisfied—in other words, there is too much money involved. There is no doubt about there having an appeal. Until it is ultimately decided, of course, all the other claims will remain in a state of flux or abeyance.

MR. ORLOFSKY: I am in the same category as Mr. White. You have indicated you will receive briefs from those opposing Mr. White's position. Now, I have the utmost confidence in Mr. White and I am certain he will present the legal issues and factual issues in the finest possible fashion, but will you also receive briefs from those who have similar interests as Mr. White?

THE REFEREE: No. I don't think I should at this time, because of the terrific number that are involved. In other words, I can't say that here I am going to receive a brief from you but not from counsel A, B, C, D, E, F, or G. There are a hundred and some claimants, represented by—I don't know how many lawyers—there must be at least 50 or 60 lawyers anyhow in this entire group, and I do not want to say that I am going to allow one counsel to file a brief on behalf of his claim and yet not allow another counsel. I think I am going to be governed by Mr. White in this respect.

* * * * *

CASE STATED

On November 16, 1962, I. J. Knight Realty Corp. (hereafter Knight Realty) filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. On the same day, Judge Van Dusen appointed Francis Shunk Brown, 3rd, Esquire, as receiver and authorized him to operate the business of Knight Realty.

The only significant asset of Knight Realty was an eight-story industrial structure known as the Fretz Building, located at 10th & Diamond Streets, Philadelphia, Pennsylvania. The business of Knight Realty consisted of leasing space in the Fretz Building and operating the building for the benefit of its tenants.

On January 1, 1963, the Fretz Building was totally destroyed by a fire of unusual intensity. The conflagration spread to adjoining premises, damaging or destroying real and personal property of the Reading Company and others.

On April 3, 1963 the Reading Company filed a claim for $559,730.83 which it styled as a claim "for administrative expenses due to the negligence of the Receiver" in operating the business of Knight Realty. In essence, the Reading Company's claim alleges that the receiver, Francis Shunk Brown, 3rd, was negligent in permitting the fire to start and "spread beyond its normal confines." Thereafter, other fire loss claimants filed 146 additional claims for administration expenses based on the alleged negligence of the receiver in operating the business of Knight Realty. The total of all such claims exceeds $3,500,000. All of the well pleaded allegations of fact in the Reading Company's Statement of Claim are to be deemed true for the purposes of the Trustee's Motion to Dismiss or Expunge the Claim of the Reading Co.

On May 14, 1963, Knight Realty was adjudicated a bankrupt pursuant to a voluntary consent to adjudication filed on its behalf. Francis Shunk Brown, 3rd, was subsequently elected Trustee in Bankruptcy of Knight Realty.

The Trustee, Mr. Brown, has petitioned this Court to expunge the Reading Company's claim on the ground that it is not an administration expense within the meaning of the Bankruptcy Act. This Court's ruling on the Reading Company's claim for administration expenses will establish the law of case with respect to all other claims for administration expenses based on the alleged negligence of the receiver.

Other claims filed in this matter consist of federal tax claims of $244,953.91, and other tax claims of $70,823.19. Various other claims are as follows: secured, $230,619.04; unsecured, $76,905.47; and wages, $860.00. The Trustee, according to present estimates, will have between $630,000 and about $845,000 depending on the outcome of certain litigation against fire insurance companies presently pending.

/s/ OWEN B. RHOADS

/s/ SAMUEL MARX
Counsel for the Trustee

/s/ MICHAEL H. MALIN
for W. WILSON WHITE
Counsel for Reading Co.

REFEREE'S OPINION

SUR TRUSTEE'S MOTION TO EXPUNGE PROOF OF CLAIM OF THE READING COMPANY

There has been filed with the Referee a Case Stated, signed by Counsel for the Trustee and Counsel for the Claimant, but since other rights in this matter may be affected, and the Case Stated is short, the Referee sets it forth anew as his Findings of Fact.

CASE STATED

"On November 16, 1962, I. J. Knight Realty Corp. (hereafter Knight Realty), filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. On the same day, Judge Van Dusen appointed Francis Shunk Brown, 3rd, Esq., as Receiver and authorized him to operate the business of Knight Realty.

"The only significant asset of Knight Realty was an eight-story industrial structure known as the Fretz Building, located at 10th & Diamond Streets, Philadelphia, Pennsylvania. The business of Knight Realty consisted of leasing space in the Fretz Building and operating the building for the benefit of its tenants.

"On January 1, 1963, the Fretz Building was totally destroyed by a fire of unusual intensity. The conflagration spread to adjoining premises, damaging or destroying real and personal property of the Reading Company and others.

"On April 3, 1963, the Reading Company filed a claim for $559,730.83, which it styled as a claim 'for administrative expenses due to the negligence of the Receiver' in operating the business of Knight Realty. In essence, the Reading Company's claim alleges that the Receiver Francis Shunk Brown, 3rd, was negligent in permitting the fire to start and 'spread beyond its normal confines.' Thereafter, other fire loss claimants filed 146 additional claims for administration expenses

based on the alleged negligence of the Receiver in operating the business of Knight Realty. The total of all such claims exceeds $3,500,000.00. All of the well-pleaded allegations of fact in the Reading Company's Statement of Claim are to be deemed true for the purposes of the Trustee's Motion to Dismiss or Expunge the Claim of the Reading Company.

"On May 14, 1963, Knight Realty was adjudicated a bankrupt, pursuant to a voluntary consent to adjudication filed on its behalf. Francis Shunk Brown, 3rd, was subsequently elected Trustee in Bankruptcy of Knight Realty.

"The Trustee, Mr. Brown, has petitioned this Court to expunge the Reading Company's claim on the ground that it is not an administration expense within the meaning of the Bankruptcy Act. This Court's ruling on the Reading Company's claim for administration expenses will establish the law of case with respect to all other claims for administration expenses based on the alleged negligence of the Receiver.

"Other claims filed in this matter consist of Federal tax claims of $244,953.91, and other tax claims of $70,823.19. Various other claims are as follows: Secured, $230,619.04; Unsecured, $76,905.47; and Wages, $860.00. The Trustee, according to present estimates, will have between $630,000.00 and about $845,000.00 depend[illegible] on the outcome of certain litigation against fire insurance companies presently pending."

QUESTION INVOLVED

Are tort claims against a Receiver under Chapter XI of the Bankruptcy Act, arising during the conduct of business of the receivership, allowable as administrative expense in an ensuing bankruptcy proceeding and entitled to priority in payment under Section 64(a)(1)?

DISCUSSION

The issue in the instant case is very simple, i.e., whether the claims of the Reading Company, and others similarly situated, are entitled to a first priority in payment as "costs and expenses of administration" pursuant to Section 64 (a) (1). If the claims fail under this Section, they are not allowable against the Bankrupt Estate in any category and the motion to expunge must be granted.

Section 64 of the Bankruptcy Act, as amended in 1962, provides, in pertinent part, as follows:

> "Section 64—Debts which have priority. a. The Debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . ."

The burden of proof rests upon the person asserting a priority under Section 64 (a) (1) to establish that his claim comes within the intended class.

In re American Anthracite v. Bituminous Coal Corp., 171 FS 377, affd. 280 F_2 219

In re Paradise Catering Corp., 36 FS 974

The brief of the Reading Company seems to be predicated upon the concept that, since the fire and any damage therefrom occurred subsequent to the appointment of the Receiver under Chapter XI, Bankruptcy Act, any damage resulting from negligence of the Receiver must necessarily be allowable as an expense of administration. This is an over-simplification of the problem and would require that the language of Section 62 and Section 64 (a) (1) of the

Bankruptcy Act be disregarded. In its brief, the Reading Company places considerable reliance upon a number of old railroad receivership cases. In addition, a case is cited involving an equitable receivership of a national bank where a receiver was appointed by the Comptroller of the Currency. None of these cases are helpful for the reason the pertinent sections of the Bankruptcy Act do not apply and the principal problem in the instant case is whether or not the Reading Company can bring itself within the purview of Section 64(a)(1).

In 1933, Congress recognized the peculiar problems involved in railroad reorganizations when it enacted Section 77 of the Bankruptcy Act. This Section codifies many of the equitable principles set forth in the cases cited by the Reading Company. For example, in *Meyer Rubber Company v. Georgetown and W. Railroad*, 174 F. 731 (1909), cited on page 5 of the Reading Company brief, it was held that the claim of an injured employee should be paid by the Receiver in an equity receivership as an administrative expense. This issue would now be controlled by Section 77(n) of the Bankruptcy Act, which specifically provides claims for injuries to employees of a railroad are to be given priority as administrative expenses. However, Section 77 has no application to the present proceedings. In enacting this Section, the Congress recognized the inherent danger in the operation of a railroad. If there had been any Congressional intention that the treatment accorded to certain limited categories of tort claims in railroad reorganizations by Section 77(n) should be applicable to Chapter XI proceedings or to ordinary bankruptcies, presumably at the same time that this Section was enacted, additional language could have and would have been added to Sections 62 and 64(a)-(1).

None of the cases cited in the Reading Company brief even purport to interpret Section 62 or Section 64(a)(1) of the Bankruptcy Act. I do not believe any of these cases will be helpful in resolving the issue.

Bunker Hill Country Club v. Robbins, 99 F. 2d 700 (C.C.A. 7th 1938) involves claims against a trustee in bankruptcy by certain persons to whom memberships in a country club had been sold. The opinion does not discuss tort claims and it appears the Court may have regarded these claims as contractual in nature. The Court stated in the opinion at page 702:

> ". . . it is inconceivable to us that an officer of the Court should be permitted to act, in what appears to be, in utter disregard of the rights of those with whom he had entered into contractual relations without making any provision for their protection."

There is also an element of unjust enrichment in the *Bunker Hill* case inasmuch as the Trustee, in effect, sold the same property twice. The issue in the instant case is not discussed.

There is a quotation on page 4 of the brief of the Reading Company from the opinion of Judge Learned Hand in the case of *Vass v. Conron Brothers Co.*, 59 F. 2d 969, 971 (C.C.A. 2d, 1932), but this is dictum and has no relationship to the issue decided by the Court. In that case, the Court affirmed an order of the district court enjoining an action against the Receiver that had been brought in state court. It is stated in the opinion on page 970:

> ". . . the lessee sued him (the Trustee) in the state court individually, as Receiver, and as Trustee, alleging that he had assumed the covenants in the lease, and that between July 10th and August 15th, he had failed to refrigerate the premises, so that perishable goods had spoiled. There is also a count for 'negligence', but this adds nothing."

There is nothing in this opinion to indicate that Judge Hand regarded the claim as a tort claim and there is no discussion of the applicable bankruptcy sections.

The only other bankruptcy case cited in the brief of the Reading Company is *In re Progress Lektro Shave Corp.*, 35 F. Supp. 915 (D. Conn., 1940). This case involves a

claim for a patent infringement and has no relevance to the problem in the instant case. It appears from the opinion that this case is based upon an unjust enrichment theory inasmuch as the Trustee sold property under circumstances that interfered with the property rights of the claimant.

The Federal Bankruptcy Law governs in this situation.

American Surety Co., v. Sampsell, 327 U. S. 269

Provisions of this Section relative to costs and expenses are to be strictly construed in aid of economy in administration of the bankrupt estate.

In re Rothman 85 F_2 51

In re Sleep Products, Inc., 242 F_2 375

The broad purpose of Section 64(a)(1) is to bring about an equitable distribution of the bankrupt's estate and if one claimant is to be preferred over another, the purpose should be clear from this Section.

U. S. v. Embassy Restaurant, Inc., 359 U. S. 29

Guenin v. Weill, Gothel, etc., 205 F_2 302

It seems reasonably evident that the purpose of the priority for administrative expenses is to permit the Receiver or Trustee to incur ordinary and necessary contractual obligations for the preservation of the assets of the estate. There is no such thing as a "necessary" tort claim, as the word "necessary" means what is reasonably advisable in order to preserve the estate of the bankrupt.

In re Hoffman, F. S. 245

In a recent opinion (Filed August 12, 1964), the Third Circuit, in the matter of Connecticut Motor Lines, Inc., No. 14645, had before it the construction of Section 64(a)(1). Certain excerpts from the opinion are so pertinent, the Referee quotes them:

"In all cases cited, the trustee or bankrupt was taxed on activities involved in further developing the bankrupt's assets or in seeking to maintain such assets for the maximum benefit of creditors. Post-bankruptcy taxation such as this had long been viewed by the courts as part of classic administration expenses.

"Thus, as the tax on such wages as is before us neither has a relationship to the cost of protecting or developing the bankrupt's assets, nor can be reasonably considered a tax on the mere distribution of the wages, Section 64(a)(1) of the Bankruptcy Act is distorted by attempting to create a fiction as was done in *United States v. Fogarty*.

"The Government's argument amounts to a bland assertion that all post-bankruptcy expenses, including taxes, are by definition first priority costs and expenses of administration.[15] There has been an unwillingness to recognize that Section 64(a)(1) does have built-in limitations. A few courts, however, have been aware of this problem and the considerations to be weighed in classifying an expense as a Section 64(a)(1) first priority matter.

"*In re Mt. Washington S.S. Co., Inc.*[16] involved the levy of a use tax on an uncompleted sailing vessel four days after the filing of the bankruptcy petition. The bankrupt's assets were insufficient to reach fourth priority creditors. The city, therefore, argued that as the tax accrued after the filing of the bankruptcy petition, a post-bankruptcy expense entitled to first priority status arose. The federal district court held that because the trustee neither operated the boat nor

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[15] The question of whether we are in fact dealing with a post-bankruptcy tax will be dealt with subsequently in the opinion. The point to be made at this time is that all post-bankruptcy expenses are not necessarily costs and expenses of administration. As this case is limited to the question of taxes, other non-first priority post-bankruptcy expenses will not be explored herein.

[16] 43 F. Supp. 176 (D.N.H. 1942).

was ever apparently authorized to operate the boat, the tax assessed could not be considered a current expense of administration.[17]

"*In Denton & Anderson Co., v. Induction Heating Corp.*,[18] a creditor-agent of the bankrupt secured orders for the bankrupt's goods prior to filing of the bankruptcy petition. The bankrupt accepted the orders, but had not filled them prior to the filing. After the filing, the bankrupt was allowed to remain in possession and operate his business, at which time the orders were filled and the creditor-agent's commissions arose upon the bankrupt's being paid for the orders. The creditor claimed that because his commissions were post-bankruptcy expenses, they were entitled to first priority status as an expense of administration. The United States Court of Appeals for the Second Circuit refused to expand 'costs and expenses of administration' to encompass such an item which merely was a post-bankruptcy expense separate and distinct from development or preservation of the bankrupt's estate, and an expense which could not be placed in the category of costs incurred because of the bankruptcy distribution.[19]

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[17] The court further indicated that because the bankrupt's assets were limited and insufficient to satisfy fourth priorities, the question of such tax fitting into that level of priority was purely academic and not worthy of discussion.

[18] 178 F. 2d 841 (2 Cir. 1949).

[19] Judge Frank stated:

". . . appellant (creditor) could at once—under Bankruptcy Act, Section 57, sub.d and 63, sub.a(8)—have filed a claim either (1) as an unliquidated claim or (2) as a contingent claim. . . . (T)he only possible questions were (a) whether the amount of the claim could be determined, and if so, (b) what the amount was. . . ."

Id. at 843. Subsequent discussion will indicate that the questions as to the possible determination of the amount of the claim and its establishment in this case are substantially similar to those which have been faced by the Second Circuit. See text, pp. 17-18.

"In both the aforementioned cases the tax or expenses was post-bankruptcy and the trustee or bankrupt was either in possession of the item taxed or operating the business from which operation the expense. *In re Mt. Washington S.S. Co., Inc.*, involved a matter entirely arising after the filing of the petition, *Denton & Anderson Co., v. Induction Heating Corp.*, was a hybrid situation, such as the one before us now. Yet, in both circumstances, the courts went beyond the mere fact of the tax or expense arising after the initiation of the bankruptcy to analyze whether such tax or expense could be reasonably considered to be a first priority cost or expense of administration. Approaching the problem in a like manner, we find the rubric 'costs and expenses of administration' to be distorted essentially when withholding and social security taxes based on labors terminated prior to bankruptcy are forced into a Section 64(a)(1) priority position.

"Our view of the boundaries of Section 64(a)(1) of the Bankruptcy Act is reinforced by the latest amendment to that Section in 1962. Prior to the 1962 amendment, Section 64(a)(1) set forth a number of individual first priority expense items under no explicit generic label. 'Costs and expenses of administration' was one of a number of particular items enumerated in Section 64(a)(1).[20] In such a posture, the Sec-

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[20] Bankruptcy Act, Section 64(a)(1), 11 U. S. C., Section 104(a)(1) (1958):

"(a) The debts to have priority, in advance of the payments of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and expenses of one or more creditors, the reasonable costs and expenses

tion did lend itself to a broad construction. The amendment altered the language of the Section to read as follows:

"(a) the debts to have priority in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . ." [21]

"The impact of the amendment was to clarify the fact that Congress had considered all expenses laid out in Section 64(a)(1) costs and expenses of administration. The legislative history makes it clear that Congress, through the amendment, wanted to underline this factor. The Senate Report [22] accompanying the amending legislation stated:

"Section 6

"(a) The first priority under Section 64(a) is frequently referred to as the 'administration expense priority.' All of the items set forth in Section 64(a)-(1) are properly regarded as 'costs and expenses of administration.' Even as clause (1) read in the Chandler Act amendment of Section 64, however, the quoted expression did not appear in the language of the clause until three separate items were mentioned."

* * *

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of such recovery; the cost and expenses of administration including the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under Chapter 9 of Title 18, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; . . ." (Emphasis added.)

[21] Bankruptcy Act, Section 64(a)(1), 11 U. S. C., Section 104(a)(1) (Supp. V. 1964). (Emphasis added.)

[22] Senate Report No. 1954, accompanying the amending legislation, H. R. 5393, August 28, 1962.

"The transposition of the words, 'the costs and expenses of administration, including,' to the beginning of Section 64(a)(1), as proposed in the suggested amendment, will make clear the intended result.

"Though those enumerated costs and expenses of administration were never meant to be all inclusive, the 1962 amendment does indicate a concern that a meaningful view be had as to what is to be considered a cost and expense of administration. By explicitly structuring Section 64(a)(1) the Congress indicated both that all items in Section 64(a)(1) were costs and expenses of administration, and that the expression 'costs and expenses of administration' was not a catchall within the first priority. With such a Congressional intent apparent, it is preferable to isolate from Section 64(a)(1), as falling without a meaningful view of costs and expenses of administration, those expenses which, though they can be considered post-bankruptcy items, are unrelated to development, preservation or distribution of the bankrupt's assets."

Since it is the clear view of the Referee, in consideration of the foregoing, that the claim is not an administrative expense claim, nor is it an unsecured claim against the bankrupt estate, the motion to expunge the claim from the docket is hereby granted, and an appropriate order will be entered herein, the claim not having been proven it will not be allowed.

CONCLUSIONS OF LAW

1. The claim of the Reading Company, not having been proved, is not allowed as an administrative expense claim.

2. The claim of the Reading Company, not having been proved, is not allowed as an unsecured claim.

3. The claim of the Reading Company is expunged from the record in this case.

/s/ THOMAS J. CURTIN
Referee in Bankruptcy

Dated at Philadelphia, Pa.,
this 30th day of September, 1964

REFEREE'S ORDER

AND NOW, to wit, this 30th day of September, 1964, in conformity with the aforesaid Opinion,

the Motion to Expunge the Claim of the Reading Company, hereinbefore filed in this case, is hereby granted, and the Claim is stricken from this record.

/s/ THOMAS J. CURTIN
Referee in Bankruptcy

PETITION FOR REVIEW

To the Honorable Thomas J. Curtin, Referee in Bankruptcy:

1. Petitioner is The Reading Company, a corporation, which has filed a proof of claim for administrative expenses in the above proceeding.

2. On September 30, 1964, your Honor entered an Order herein as:

> "AND NOW, to wit, this 30th day of September, 1964, in conformity with the aforesaid Opinion,
>
> the Motion to Expunge the Claim of the Reading Company, hereinbefore filed in this case, is hereby granted, and the Claim is stricken from this record."

The aforesaid Order was based upon findings that:

> "1. The claim of the Reading Company, not having been proved, is not allowed as an administrative expense claim.
>
> 2. The claim of the Reading Company, not having been proved, is not allowed as an unsecured claim.
>
> 3. The claim of the Reading Company is expunged from the record in this case."

3. The said findings are erroneous in that the Reading Company is entitled as a matter of law to prove the negligence liability of the Receiver and Trustee and upon proof of liability in accordance with state law, to have such liquidated amount allowed as an administrative expense of the estate of the bankrupt.

WHEREFORE, petitioner prays that Your Honor certify to the judge of this court and transmit to the clerk the record in said proceedings having to do with, or in any manner bearing upon, the order aforesaid, as provided in §39 of the Bankruptcy Act.

WHITE AND WILLIAMS
Attorneys for Reading Company

By /s/ W. WILSON WHITE
/s/ MICHAEL H. MALIN

OPINION OF THE DISTRICT COURT

VAN DUSEN, *J.* June 9, 1965

This case is before the court upon the petition of the Reading Company to review an order of the Referee in Bankruptcy, expunging a claim filed by the Reading Company asking for damages allegedly caused by the negligence of the Receiver in carrying on the business of the bankrupt (pp. 34 and 35 of Document 8). Petitioner seeks to have its claim, based on losses suffered in a fire which started on the bankrupt's property, allowed as a priority claim for administrative expenses under §64(a)(1) of the Bankruptcy Act, 11 U. S. C. §104. Petitioner is but one of over a hundred claimants who have filed proofs, but it has been agreed that the instant case is a test case which will decide the right of all claimants to prove their claims as administrative expenses.

The CASE STATED, as filed with the Referee and signed by counsel for the Trustee and counsel for the claimant, is as follows:

> "On November 16, 1962, I. J. Knight Realty Corp. (hereafter Knight Realty) filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. On the same day, Judge Van Dusen appointed Francis Shunk Brown, 3rd, Esquire, as receiver and authorized him to operate the business of Knight Realty.
>
> "The only significant assets of Knight Realty was an eight-story industrial structure known as the Fretz Building, located at 10th & Diamond Streets, Philadelphia, Pennsylvania. The business of Knight Realty consisted of leasing space in the Fretz Building and operating the building for the benefit of its tenants.
>
> "On January 1, 1963, the Fretz Building was totally destroyed by a fire of unusual intensity. The conflagration spread to adjoining premises, damaging

or destroying real and personal property of the Reading Company and others.

"On April 3, 1963, the Reading Company filed a claim for $559,730.83 which it styled as a claim 'for administrative expenses due to the negligence of the Receiver' in operating the business of Knight Realty. In essence, the Reading Company's claim alleges that the receiver, Francis Shunk Brown, 3rd, was negligent in permitting the fire to start and 'spread beyond its normal confines.' Thereafter, other fire loss claimants filed 146 additional claims for administration expenses based on the alleged negligence of the receiver in operating the business of Knight Realty. The total of all such claims exceeds $3,500,000. All of the well pleaded allegations of fact in the Reading Company's Statement of Claim are to be deemed true for the purposes of the Trustee's Motion to Dismiss or Expunge the Claim of the Reading Co.[1]

"On May 14, 1963, Knight Realty was adjudicated a bankrupt pursuant to a voluntary consent to adjudication filed on its behalf. Francis Shunk Brown, 3rd, was subsequently elected Trustee in Bankruptcy of Knight Realty.

"The Trustee, Mr. Brown, has petitioned this Court to expunge the Reading Company's claim on the ground that it is not an administration expense within the meaning of the Bankruptcy Act. This Court's ruling on the Reading Company's claim for administra-

[1] The case is now before the court in a situation similar to that where the defending party has filed a motion to dismiss (to be treated as one for summary judgment under F. R. Civ. P. 12(b), which is made applicable by General Order in Bankruptcy 37) on a record which concedes a factual issue which will have to be determined by trial if the motion to dismiss is denied. The factual issue conceded for purposes of this Motion is whether or not the Receiver was negligent. The undersigned rejects the apparent contention of the Government that suit for the damage claimed by Reading Company could not be brought, as a matter of law, under 28 U. S. C. §959(a) on the basis of this record.

tion expenses will establish the law of case with respect to all other claims for administration expenses based on the alleged negligence of the receiver.

"Other claims filed in this matter consist of federal tax claims of $2,444,953.91, and other tax claims of $70,823.19. Various other claims are as follows: secured, $230,619.04; unsecured, $76,905.47; and wages, $860.00. The Trustee, according to present estimates, will have between $630,000 and about $845,000 depending on the outcome of certain litigation against fire insurance companies presently pending."

There are two questions presented by the facts of the case at bar:

(A) The principal question is whether the Reading Company's claim comes within "the costs and expenses of administration" of § 64(a)(1) of the Bankruptcy Act.

(B) If the answer to (A) is in the negative, does the Reading Company still have a "provable" claim so that the Referee should not have expunged it.

A. "Costs and expenses of administration"

(§ 64(a)(1) of the Bankruptcy Act, as amended—11 U. S. C. §104(a)(1))

The claim of the Reading Company does not fall within the above-quoted language of § 64(a)(1) of the Bankruptcy Act, as amended to December 1962, for these reasons:

1. The claim does not fall within the language of the Act, strictly construed

Section 64 of the Bankruptcy Act, as amended in 1962, provides in pertinent part as follows:

> "§ 64. Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . ."

Where statutes involving priorities are in issue, a strict construction must be placed thereon and the burden falls upon those asserting the priority to establish that their claim falls within the class of those intended to be preferred. *In re American Anthracite and Bituminous Coal Corp.*, 171 F. Supp. 377, 381-2 (S. D. N. Y. 1959), aff'd. 280 F. 2d 119 (2nd Cir. 1960).

Since this claim is not "an actual and necessary cost and expense of preserving the estate," there is no specific authority for paying this claim. Where no explicit authority exists in the Bankruptcy Act for allowance of expenses out of the bankrupt's estate, such an allowance is appropriate only in exceptional cases. *In re Friedman*, 232 F. 2d 151 (2nd Cir. 1956); *Guerin v. Weil, Gotshal & Manges*, 205 F. 2nd 302 (2nd Cir. 1953).

2. The legislative history of the Bankruptcy Act requires that § 64(a)(1) may not be construed to apply to this claim.

(a) Since Congress has shown by its inclusion of the following language in § 77(n) (11 U. S. C. § 205(n)) of the Bankruptcy Act in 1933 [2] that it uses specific language where it intends to prefer negligence claims and have them paid as operating expenses and, by its failure to include such language in § 62 or 64 of the Bankruptcy Act

[2] The present §77(n) was titled §77(s) in 1933. It was renumerated to §77(n) in 1935 and amended in 1939 to include preferences for railroad employees holding tort claims in equity receiverships.

in any of the several revisions of these sections since 1933, that there is a Congressional intent not to treat such tort claims as operating expenses and not to give them a preference, § 64(a)(1) does not cover this claim by Reading Company:

> "In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees . . . brought against such railroad corporation . . . shall be preferred and paid out of such railroad corporation as operating expenses of such railroad."

Authorities have recognized generally the significance of the special provision in § 77(n) applying to railroads. In 5 Collier on Bankruptcy, § 77.21, at page 568, the following statement appears:

> "It is extremely doubtful, however, if § 64, governing priorities in ordinary bankruptcy, can be considered generally applicable. The classification of priorities there set forth is not adaptable to railroad reorganization, ..."

See, also, *In Re Hudson & Manhattan Railroad Company*, 178 F. Supp. 103 (S. D. N. Y. 1955); aff'd. 273 F. 2d 707 (2nd Cir. 1960).[3]

(b) The legislative changes to § 64(a)(1) require its limitation to the type of expenses specified in that section and to claims for expenses of preserving the bankrupt's estate.

In the 1952 Congressional Reports concerning the part of § 64(a)(1) relating to priorities to be given to admin-

[3] It was held that tort claims were not entitled to a priority since §77(n) did not apply to the debtor.

istration expenses in ensuing bankruptcies, Congress made clear that administration expenses to be given priorities were those that would prevent "a breakdown of administration."[4] A similar Congressional Report in 1962 accompanying the bill which adopted § 64(a)(1), as quoted at page 4 above, made clear that the enumerated expenses in the section as worded in 1962 are the type of "costs and expenses of administration" contemplated.[5] The United States Court of Appeals for the Third Circuit has emphasized that the legislative history of this section requires that these "costs and expenses" must be related to "development, preservation or distribution of the bankrupt's estate," using this language in *In Re Connecticut Motor Lines, Inc.*, 336 F. 2d 96, 102 (3rd Cir. 1964):

> ". . . Congress indicated both that all items in Section 64, sub. a(1) were costs and expenses of administration, and that the expression 'costs and expenses of administration' was not a catchall within the first priority. With such a Congressional intent apparent, it is preferable to isolate from Section 64, sub. a(1), as falling without a meaningful view of costs and expenses of administration, *those expenses which, though they can be considered post-bankruptcy items, are unrelated to development, preservation or distribution of the bankrupt's assets.*" (Emphasis supplied.)

Allowance of claims such as petitioner's will not "develop, preserve or distribute this estate" but in cases such

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[4] See Senate Report No. 1395, 82nd Cong., 2d Sess. (1952) 4, which states in part:

> ". . . Unless provision is made for payment of the costs and expenses necessary to liquidate, administer and close the estate in the ensuing bankruptcy proceeding, ahead of all prior incurred and unpaid administration costs and expenses, there is always danger of a breakdown of administration. . . ."

[5] See Senate Report No. 1954, accompanying the amending legislation, H. R. 5393, August 28, 1962, U. S. Code, Congressional and Administrative News, p. 2603 (1962).

as this would decimate it with $3,500,000. of claims. The undersigned agrees that the repairing of these pipes in the Fretz Building is an activity related to the preservation of the bankrupt's assets and the cost of such activity would be an expense of administration. However, damage caused by any fire resulting from the negligent manner in which this activity was carried on can hardly be considered an expense related to the preservation of the bankrupt's assets. Specific language should be secured from Congress to accomplish the result sought by the Reading Company, just as Congress acted in 1962 to cover specifically the claims disallowed in *Guerin v. Weil, Gotshal & Manges*, supra, at 305.[6]

The Supreme Court, in discussing the subordination by § 67(c) of certain secured liens to the claims under § 64(a)(1) and (2), stated in *Goggin v. California Labor Div.*, 336 U. S. 118, at 127 (1949):

> "The background of § 67c suggests a conscious purpose to give a narrowly limited priority to administrative expenses and to certain wage claims . . . ."

The Supreme Court based the above statement on a part of the legislative history of § 67(c) indicating that such "narrowly limited priority" was necessary to secure effective administration of the bankruptcy law. This part of

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[6] Senate Report No. 1954, referred to in footnote 5 above, contains this language (see p. 2608 of 1962 U. S. Code, Congressional and Administrative News):

> "The expenses of petitioning creditors who have obtained an adjudication after a contest constitute a proper cost and expense of administration. These expenses should include compensation paid to accountants and appraisers whose services were necessary. In the case of Guerin v. Weil, Gotshall & Manges, (205 F. 2d 302 (2d Cir. 1953)), the court disallowed such expenses, however, and suggested that their inclusion would require specific congressional action (205 F. 2d at 302). This inclusion would be accomplished by the proposed amendment of section 64a(1), which adds new language immediately preceding the proviso."

the legislative history relevant to the case at bar quoted by the Supreme Court is (see footnote 8, p. 128):

> " 'It is significant that in recent years state legislatures have been enacting special legislation in favor of tax claims, public debts, and a variety of private claims. Statistics in the bankruptcy cases show that the effective administration of the bankruptcy law has seriously suffered therefrom. Such claims . . . consume the entire estate, leaving nothing for the payment of the costs and expenses of administration incurred in reducing the assets to cash . . . .
>
> " 'There is therefore need for a provision to protect the administration costs and expenses; . . . .' " (From an explanatory note attributed to Jacob I. Weinstein in a Committee Report Analysis of H. R. 12889, 74th Cong., 2d Sess. (1936), cited at 336 U. S. 127-9.)

Thus, administration costs and expenses are those which promote effective administration of the bankruptcy law. Petitioner's claim is not such a cost or expense.

3. The decided cases indicate a holding that this claim does not fall within the scope of §64(a)(1).

There are no cases which have directly considered the issue raised by the facts on this record. However, there are two Circuit Court of Appeals cases which indicate that a tort claim is not an administrative expense within §64(a)-(1). *In Re Hudson*, supra,[7] held that tort claims which arose after the filing of a petition were not entitled to a priority as an administrative expense where the proceeding was a Chapter X reorganization. The claimants argued that the bankrupt qualified as a railroad corporation and that they, therefore, fell within §77(n) of the Bankruptcy Act. Although §64(a)(1) was not discussed, the court implicit-

[7] The opinion relied on in this case is by the District Court and it was affirmed by the Second Circuit, 273 F. 2d 708.

ly held that tort claims were not entitled to a priority under that section when it held that the bankrupt was not a railroad corporation and that the claimants were consequently not entitled to priority as an operating expense. *In re Connecticut Motor Lines, Inc.*, supra, is indicative of the narrow view that the Court of Appeals for the Third Circuit has taken of the scope of §64(a)(1). Although this case was not concerned with the issue of whether or not tort claimants were entitled to a priority under this section, its holding did limit this section to only those post-bankruptcy expenses which are related to development, preservation or distribution of the bankrupt's estate. As discussed above, the undersigned is of the opinion that the instant petitioner's claim is not such an expense.

B. The Referee correctly expunged the Reading Company's claim from the record.

Since the Reading Company's claim does not qualify as an administration expense, the Referee was correct in expunging it from the record, as it was not provable as an unsecured claim under §63 of the Bankruptcy Act, 11 U. S. C. §193. "In order to be entitled to a *pro rata* share in the estate, a claim must have been allowed, and allowance depends first of all upon due and timely proof and filing." 3 Collier on Bankruptcy, 14th Ed., §63.05, at p. 1780. Section 63, entitled "Debts Which May Be Proved," states that negligence actions must be instituted prior to and be pending at the time of filing the petition in bankruptcy in order to be provable. The date of the filing of the petition in bankruptcy is considered to be November 16, 1962, the date of the filing of the petition under Chapter XI, §378, of the Bankruptcy Act, 11 U. S. C. §778. Since the fire occurred on January 1, 1963, all actions and claims for the alleged negligence have been filed subsequent to the filing of the petition in bankruptcy. Thus, any claim of the Reading Company arising out of this fire is

not provable as an unsecured claim under §63 of the Act and, therefore, not entitled to a pro rata share of the estate.

The Referee properly expunged the Reading Company's claim from the record.

The able briefs of the parties have been filed as Documents 9-12. Comments on several cases relied on by the Reading Company are contained in Appendix A.

ORDER OF THE DISTRICT COURT

AND NOW, June 9, 1965, IT IS ORDERED that the Petion for Review of the Reading Company, certified by the REFEREE'S CERTIFICATE FOR REVIEW dated October 9, 1964, is DENIED and that the Order of the Referee dated September 30, 1964, is AFFIRMED.

/s/ FRANCIS L. VAN DUSEN, J.

Appendix A

TO MEMORANDUM OPINION AND ORDER OF JUNE 1965

Petitioner first asserts that all the text writers agree that tort damage claims are allowable as administrative expenses. After this assertion, petitioner quotes from four different sources which generally state that damages from torts arising during the period that a business is being operated by a receiver are considered a part of the operating expense of the receivership. However, the statements of these writers, when taken in context, are concerned with the broad range of receiverships in general and none of the cases cited as authority by the writers for the quoted statements are at all similar to the case at bar.[1] The cases relied on deal mainly with railroad receiverships or state receiverships, and none of them discusses the allowance of tort damages during bankruptcy as priority claims under §64(a)(1). Of the several cases cited by the petitioner, only two of them discuss the interpretation of "costs and expenses of administration" as that phrase is used in §64(a)(1): *In re Progress Lektro Shave Corp.*, 35 F. Supp. 915 (D. Conn. 1940); and *In re Connecticut Motor Lines, Inc.*, 336 F. 2d 96 (3rd Cir. 1964). Neither of these cases is concerned with the issue of whether tort damages suffered during the period of operation of a business by a Receiver or Trustee are administrative expenses. Other

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[1] E.g., 3 Collier on Bankruptcy, §62.15, p. 1540:

"Among other expenses incident to conducting a business and therefore allowable as administrative expenditure may be . . . payments of claims for personal injuries inflicted in the operation of a business. . . ."

The case relied on in the footnote for this statement held that a personal injury claim accrued during the operation of a railroad by a receiver was a cost of administration. Railroad reorganizations have been specifically recognized to have peculiar problems and the cases allowing these tort claims to be costs of administration are based on §77(n), not §64(a)(1) (see part A-2(a) of the foregoing opinion).

cases cited do concern themselves with whether such claims are administrative expenses, but do not discuss whether or not such are allowable under the section in question.

Cases Where Estate Profited From Tort Claim

In *In re Progress Lektro Corp.*, supra, relied on by the petitioner, the facts are distinguishable from the instant case as there a trustee sold for the benefit of the estate an article covered by the claimant's patent, thus depriving the patentee of his exclusive right of sale. The court found this to be a violation of the patent laws and it held the plenary powers of Congress in the field of bankruptcy to be subject to the guarantees of the patent laws. In other words, the money received by the estate for the sale of this patented article in reality belonged to the patentee and to have denied him a priority would have been to deny him the right to his own property. In the case at bar, there has been no appropriation to the benefit of the estate of the petitioner.

Bereth v. Sparks, 51 F. 2d 441 (7th Cir. 1931), is similarly distinguishable. This case is concerned with a bank receivership and not with §64(a)(1), but will be discussed for purposes of relevancy as to what constitutes "costs and expenses of administration." In *Bereth*, the claim arose out of a bank's unlawful attachment of the claimant's personal property. Subsequent to such attachment, the bank was placed in receivership. The claimant sued the receiver in a replevin action and recovered possession of the property. If that claim had been denied a priority, as in the *Lektro Corp. case*, supra, the claimant would have been denied access to his own property.

In another case relied on by petitioner, *In re Hunter*, 151 Fed. 904 (E.D. Pa. 1907), the court allowed a claim for loss of rent where a trustee, just prior to the sale of the bankrupt's property, intentionally refused to remove the bankrupt's property for the purpose of avoiding the removal expense. The court stated that this claim could not

be proved under §63, but did not state why the claim was being allowed. The court held that the trustee was personally liable on the landlord's claim, but that the estate was liable over to the trustee, "the estate having profited from the trespass." Thus, this case is not authority for the proposition that tort damages arising during receivership are costs of administration because such is not discussed in the case and, even if the damages recovered were allowed as costs of administration, it would have been on the theory that these damages were accrued as "a cost of preserving the estate." If recovery is allowed in the instant case, it cannot be on the theory that the damages were intentionally accrued in order to preserve the estate.

Other Cases Relied On By Petitioner

Petitioner places heavy reliance on a statement by Judge Learned Hand in *Vass v. Conron*, 59 F. 2d 969, at 971 (2nd Cir. 1932).[2] In that case, a state court action against a receiver and trustee was enjoined as being in an improper forum. The undersigned agrees with the Referee that the statement relied on by petitioner was dictum and rejects the petitioner's contention that Judge Hand could not constitutionally enjoin the action in the state court without discussing what comprises an administrative expense.

Two other cases cited by the petitioner in support of its contention that its tort claim should be accorded priority are *Cowdrey v. Galveston, etc. R. R. Co.*, 93 U. S. 352 (1876), and *Farmers' Loan and Trust Co. v. Northern Pac. R. Co.*, 74 Fed. 431 (D. Ore. 1896). Both of these are cases involving railroads in receivership. Once again, neither involves the question of interpreting §64(a)(1), but both are cited for their relevance to the determination of ad-

[2] ". . . the liquidation of the lessee's resulting damages was as much a part of the usual administration in bankruptcy, as that of the pay of accountants, custodians or other assistants, employed by the trustee."

ministration expenses during receiverships in general. In many old cases railroads in receivership allowed negligence claims as administrative expenses. However, as discussed in the foregoing opinion (part A-2(b)), the enactment of §77 of the Bankruptcy Act in 1933 was a recognition by Congress of the peculiar problems entailed in the reorganization of railroads engaged in interstate commerce.[3]

[3] In its reply brief, petitioner cited one other case, *Valdes v. Feliciano*, 267 F. 2d 91 (1st Cir. 1959), which it feels is significant because of a statement made by Judge Hastie in the opinion. As noted by the letter of counsel for the trustee in bankruptcy dated March 8, 1965 (attached to Document 9), no significance may be attached to the quoted statement because it starts with the words "It is argued that . . .", thus showing that the court there was considering the claim as an administrative expense only in a hypothetical sense. Further, the claim was against a railroad receiver.

Opinion of the U.S. Court of Appeals

(Filed January 6, 1967)

Argued May 5, 1966

Reargued December 8, 1966

Before STALEY, *Chief Judge* and MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges*

By KALODNER, *Circuit Judge*

The issue presented on this appeal is whether appellant's claim, if proved, is entitled to the priority status accorded to costs of administration by Section 64, sub.a(1) of the Bankruptcy Act.[1]

The facts are not in dispute, and have been stipulated. In substance, they are as follows:

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[1] "Sec. 64. Debts which have priority.

"a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superceded proceeding and in the suspended bankruptcy proceeding, if any; . . ." Bankruptcy Act, §64 sub.a(1), 11 U.S.C.A. §104, sub.a(1), Sept. 25, 1962, 76 Stat. 571.

On November 16, 1962, I. J. Knight Realty Corp. filed a petition for arrangement under Chapter XI of the Bankruptcy Act. On the same day, the District Court appointed a Receiver and authorized him to operate the debtor's business, which consisted principally in the leasing of the debtor's eight-story industrial building in Philadelphia. On January 1, 1963, this building was destroyed by a fire which spread to adjoining premises and caused damage to real and personal property of The Reading Company, appellant herein, and of others.

On April 3, 1963, appellant filed a claim for damages in the amount of $559,730.83, alleging that the receiver was negligent in permitting the fire to start and "to spread far beyond its normal confines." The claim specifically recited that it was "for administrative expenses due to the negligence of the Receiver in operation of business of the debtor." Other claimants have filed 146 additional claims, similarly grounded and similarly seeking priority status as administration expenses, totalling in excess of $3,500,000. Those claims are held in abeyance by the Referee pending the ultimate disposition of the claim now on appeal.

On May 14, 1963, the debtor was voluntarily adjudicated a bankrupt. A Trustee was elected, and he moved to expunge appellant's claim on the ground that it was not an administration expense under Section 64, sub.a(1) of the Bankruptcy Act.[2] The Referee expunged the claim. On

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[2] The stipulation of the parties, entitled "Case Stated", is set out at 242 F. Supp. at 338-339. It appears therefrom that the Trustee will have for distribution between $630,000 and $845,000, depending on the outcome of pending litigation against fire insurance companies. The status of the instant claim becomes important particularly to the United States, which has a substantial priority claim under Section 64, sub.a(4).

petition for review, the District Court concluded that the claim was not entitled to priority as an administration expense under Section 64, sub.a(1).[3] 242 F. Supp. 337 (E.D. Pa. 1965).

We are of the opinion that the Order of the District Court should be affirmed.

The right of a claim to priority status in a Chapter XI proceeding is controlled exclusively by Section 64 of the Bankruptcy Act by virtue of the provisions of Section 302 of the Act.[4] In the matter of Chicago Express, Incorporated, 332 F.2d 276, 278 (2 Cir. 1964), cert. den. 379 U.S. 879; American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119 (2 Cir. 1960). Manifestly, the right to priority depends upon the ability of the appellant to bring its claim within the language of the preferential classification sought. Goldie v. Cox, 130 F.2d 690 (8 Cir. 1942).

We recently expressly ruled that expenses which "are

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[3] The District Court also concluded, as did the Referee, that appellant's claim was not provable as a general claim. 242 F. Supp. at 342. On this appeal, appellant "agrees that the claim here asserted is not provable as a general claim under §63a(7) [11 U.S.C.A. §103a(7) (1953 Supp. 1964)] of the Act. . . ." Appellant's Brief, p. 20.

[4] Chapter XI.—Arrangements

"Sec. 302. The provisions of chapters I to VII, inclusive, of this Act, shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered." July 1, 1898, c. 541, §302, as added June 22, 1938, c. 575, §1, 52 Stat. 905; 11 U.S.C.A. §702.

unrelated to development, preservation or distribution of the bankrupt's assets" cannot be considered "costs and expenses of administration" within the meaning of Section 64 sub.a(1) as amended in 1962. In the Matter of Connecticut Motor Lines, Inc., 336 F.2d 96 (1964).

We there said at pages 101-102:

> "Our view of the boundaries of Section 64, sub.a(1) of the Bankruptcy Act is reinforced by the latest amendment to that Section in 1962. Prior to the 1962 amendment, Section 64, sub.a(1) set forth a number of individual first priority expense items under no explicit generic label. 'Costs and expenses of administration' was one of a number of particular items enumerated in Section 64, sub.a(1). In such a posture, the Section did lend itself to a broad construction. The amendment altered the language of the Section to read as follows:
>
> "'(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) *the costs and expenses of administration, including* the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . .
>
> "The impact of the amendment was to clarify the fact that Congress had considered all expenses laid out in Section 64, sub.a(1) costs and expenses of administration. The legislative history makes it clear that Congress, through the amendment, wanted to underline this factor. . . .
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> * * * * *
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> "Though those enumerated costs and expenses of administration were never meant to be all inclusive, the 1962 amendment does indicate a concern that a meaningful view be had as to what is to be considered a cost

> and expense of administration. By explicitly structuring Section 64, sub.a(1) the Congress indicated both that all items in Section 64, sub.a(1) were costs and expenses of administration, and that the expression 'costs and expenses of administration' was not a catch-all within the first priority. With such a Congressional intent apparent, it is preferable to isolate from Section 64, sub.a(1), as falling without a meaningful view of costs and expenses of administration, those expenses which, though they can be considered *post-bankruptcy items*, are unrelated to development, preservation or distribution of the bankrupt's assets."

This touchstone guide to the direction of Section 64 sub.a(1) finds support not only in the legislative history, as shown by the Court's opinion, but also in existing authority. See, American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A. *supra*, at 124-126; Saper v. John Viviane & Son, Inc., 258 F.2d 826 (2 Cir. 1958); Guerin v. Weil, Gotshal & Manges, 205 F.2d 302 (2 Cir. 1953). As these cases indicate, it is not every post-petition event giving rise to a cost, expense or liability which qualifies the cost, expense or liability for priority status under Section 64 sub.a(1).

This is the standard applied by the court below. We agree with it, and with its conclusion that appellant's tort claim does not fall within the restrictive language of Section 64 sub.a(1) as an expense so related to the development, preservation or distribution of estate assets as to be deemed to have been incurred in connection therewith. Existing judicial interpretation and application of Section 64 sub.a(1) does not indicate any other result. Indeed, it is evident that the Congress knows how to assure the priorities it desires. See, In the Matter of Hudson & Manhattan Railroad Company, 178 F. Supp. 103 (S.D.N.Y. 1959), aff'd sub nom. Augus v. Stichman, 273 F.2d 707 (2 Cir. 1960); Senate Report No. 1954, accompanying the amend-

ing legislation, H.R. 5393, 1962 U.S. Code Congressional and Administrative News, pp. 2603, 2608.

Appellant seeks an application of Section 64 sub.a(1) founded upon principles, according to the authorities it cites, utilized in equity receivership proceedings. But we find no compelling persuasion in such authorities here, where we have to deal with a purposeful statutory restriction. Cf. In the Matter of the Pusey and Jones Corporation, 295 F.2d 479 (3 Cir. 1961); In the Matter of Chicago Express, Incorporated, *supra;* American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A. *supra.*

Federal courts cannot extend the reach or sweep of a federal statute beyond its clearly defined provisions as we recently explicitly ruled in American Dredging Company v. Local 25, Marine Division, International Union of Operating Engineers, 338 F.2d 837 (1964), cert. den. 380 U.S. 935 (1965).

The purposeful statutory restriction, earlier discussed, cannot be amended by judicial legislation to accomplish the result which the minority advocates.

As we said in *American Dredging* at page 850:

> "Courts have inherent power to construe legislation and to *fashion* remedies to effectuate the legislative design but they do not have power to legislate, directly or indirectly, nor can they *amend* legislation to extend its clearly defined limits under the shelter of their power to *fashion remedies.*
>
> "The Constitution of the United States has reserved to the Congress the power to legislate. Article I, section 1 provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'.
>
> "Not even the Supreme Court of the United States can usurp the legislative power reserved to the Congress by the Constitution. The Supreme Court itself

has time and again paid homage to the doctrine of the separation of powers decreed by the Constitution and declared that judicial legislation is abhorrent to, and in violation of, the Constitutional scheme."

Section 64 provides that "actual and necessary expenses of preserving the estate" are entitled to a priority. The words "actual and necessary" require that the expenses be proximately related to the preservation of the estate and that they must be reasonably anticipated as a cost of operating the business. Cf. Jopek v. New York Central R.R., 353 F.2d 778 (C.A. 3, 1965). The word "necessary" in §162(a) of the Internal Revenue Code of 1954 has been similarly construed.

This construction adequately answers the question as to whether the costs of insurance would be entitled to a priority. The insurance costs which were reasonable or which were incurred in reasonable anticipation of liability within certain limits would obviously fall within §64. Those premiums, however, which were excessive—which provided for liability far in excess of that which could be reasonably anticipated—would not be entitled to a priority and, in fact, the receiver could be surcharged for their cost.

For the reasons stated, the Order of the District Court will be affirmed.

FREEDMAN, *Circuit Judge*, dissenting.

I dissent from the majority's conclusion that § 64a(1) requires the virtual immunization from tort liability of a business which is conducted by a receiver in a Chapter XI proceeding. Congress has not given us a blueprint which yields an immediate and unequivocal answer to the question and I would therefore approach it as would men of practical business experience. I believe the conclusion to which this points is in harmony with the applicable law and

accords with the equitable role of the Bankruptcy Court (§ 2 of the Bankruptcy Act. 11 U.S.C. § 11(a); see, e.g., *Bank of Marin v. England*,—U.S.—(1966); *In re Laskin*, 316 F.2d 70, 73 (3 Cir. 1963)), which applies in Chapter XI proceedings as elsewhere. See *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455-58 (1940).

The fundamental purpose of a Chapter XI proceeding, unlike a straight bankruptcy, is the ultimate rehabilitation of the debtor. *Nicholas v. United States*, 384 U.S. 678, 684-85 (1966); *SEC v. American Trailer Rentals Co.*, 379 U.S. 594, 603-7 (1965). The inevitable consequence of this is the continued operation of the business of the debtor and an on-going situation decisively different from the frozen rigidity of a straight bankruptcy liquidation. The reorganization court therefore applies its equitable powers to carry out this wider, business purpose.[1] Both from equitable considerations and because Congress has specifically provided that a receiver who operates the business of a debtor shall do so subject to the same requirements of law and in the same manner as if he were the debtor (28 U.S.C. § 959(b)),[2] the courts have recognized that during the pendency of a Chapter XI proceeding the receiver's operation of a business should involve the risks and liabilities which normally would flow from a business operation. Such

[1] See Matter of South Jersey Land Corp., 361 F.2d 610, 614-15 (3 Cir. 1966); Matter of Fleetwood Motel Corp., 335 F.2d 857, 862 (3 Cir. 1964), both Chapter X proceedings, which, despite their differences from Chapter XI, are fundamentally similar in looking to continuation of the business rather than liquidation. See SEC v. American Trailer Rentals Co., *supra*.

2 Section 959(b) reads:

"A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

expenses therefore are entitled to payment as administrative expenses before the pre-bankruptcy claims of creditors, for whom the business is being operated as if they were stockholders. 3 *Collier on Bankruptcy* (14th ed. 1966), § 62.15, p. 1540. Thus, taxes incurred during a receivership which is established, not to wind up the business, but to foster it, have been given priority as an expense of administration. So it has been held in an equity receivership,[3] in the operation of a business in bankruptcy liquidation,[4] and in a Chapter XI proceeding.[5] These decisions have the utmost significance. They accord priority under § 64a(1) to taxes, which are not specifically listed in that section, even though the automatic accrual of such liabilities leaves no room for the rationale that priority is granted to encourage the extension of credit to the debtor.

There is no equitable reason why the claim for a tort committed by the receiver after the filing of the petition should not have the same priority which is given to a tax claim or even a contractual obligation[6] incurred after the filing of the petition. Like the operation of motor vehicles by the receiver or his employees, the shutting off of water pipes, which led to the fire, is part of an activity which may involve much profit to the estate and help to preserve the assets. It should also incur the well-known price or cost of such activities, i.e., the cost of liability insurance premiums or, absent insurance, direct responsibility for negligence as a cost and expense of preserving and manag-

[3] Michigan v. Michigan Trust Co., 286 U.S. 334 (1932), Cardozo, J., involving state corporate franchise taxes.

[4] Boteler v. Ingels, 308 U.S. 57 (1939), involving automobile license fees and penalties.

[5] Nicholas v. United States, 384 U.S. 678 (1966), where it was said that federal income taxes and interest thereon were an administrative expense.

[6] Compare In re Delaware Hosiery Mills, Inc., 202 F.2d 951 (3 Cir. 1953), and In re Arbycraft Co., 288 F.2d 553, 557 (3 Cir. 1961), where we treated claims as administration expenses under § 64a(1), although there was no express authorization in the statute.

ing the estate. The argument of the government that the risk of such liability would make suppliers unwilling to extend credit and secured creditors reluctant to accept an arrangement, ignores the ability to provide against that risk by insurance. To refuse to recognize claims resulting from the operation of the business is to create a substantial immunity from liability, ironically enough, at a time when it is being generally recognized that tort immunity has little justification. See, e.g., *United States v. Muniz*, 374 U.S. 150, 165-66 (1963). For it is clear that a tort claim based on post-petition activities cannot be proven as an ordinary claim. (See § 63 of the Bankruptcy Act, 11 U.S.C. § 103.) Today's decision, therefore, will discourage receivers and creditors of the debtor from approving expenditures for premiums for public liability insurance. It will not be much alleviated by the menace of surcharge for premiums which the majority now directs against receivers for misjudging the treacherous ground of "reasonable" insurance, or "reasonable anticipation of liability," or "excessive" premiums. Once again, it seems to me, contractual claims are unjustifiably exalted and the risks to which the public is exposed by torts which experience shows are an inevitable result of the operation of a business are treated as outcast. And what should a receiver do if in his wise judgment it is advantageous to the estate to continue to operate the business by following its former policy of acting as a self insurer rather than to begin to pay large premiums?

The trend of the decisions supports the view that the present claim is entitled to priority. Priority as an administrative expense has been accorded tort claims in straight bankruptcy cases.[7] It has been similarly granted in equity

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[7] Vass v. Conron Bros. Co., 59 F.2d 969 (2 Cir. 1932); In re Progress Lektro Shave Corp., 35 F.Supp. 915 (D.Conn. 1940); In re Michigan Motor Specialties Co., 288 Fed. 377 (E.D. Mich. 1923).

and statutory receiverships,[8] and although it is true that equity receiverships are not governed by § 64a(1), nevertheless, with respect to administration of an estate, such receiverships are fundamentally similar to Chapter XI proceedings, a similarity which the Supreme Court has recognized in determining the scope of § 64a(1). See *Nicholas v. United States*, 384 U.S. 678, 684 n. 12 (1966). There is no reason why we should not do the same.

The three cases cited by the majority in support of its refusal to apply the equity rule, *In re Pusey & Jones Corp.*, 295 F.2d 479 (3 Cir. 1961), *In re Chicago Express, Inc.*, 332 F.2d 276 (2 Cir. 1960), cert. denied, 379 U.S. 879 (1965), and *American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119 (2 Cir. 1960), differ significantly from this case. None of them involved tort claims, and in each of them the claimant admittedly was entitled to share with the general creditors. Moreover, neither *Pusey & Jones* nor *Chicago Express* involved claims of priority under § 64a(1) and both dealt with the application to Chapter XI proceedings of a special rule that had come to be applied in reorganizations of "public corporations" but was not a general doctrine of equity receiverships; indeed the conclusion in both cases was based on equitable considerations. *American Anthracite* dealt with the special problem of the assumption of existing contracts by the debtor in possession for which there was a history of special statutory provisions in bankruptcy.

The majority relies heavily on *In the Matter of Connecticut Motor Lines*, 336 F.2d 96 (3 Cir. 1964). We there held that tax expenses arising out of activities which occurred prior to the filing of the petition were properly allocable to the pre-petition period and therefore not en-

[8] E.g., Texas & Pacific Railway Co. v. Bloom's Adm'r., 164 U.S. 636, 642-43 (1897); Barton v. Barbour, 104 U.S. 126, 130 (1881); Bereth v. Sparks, 51 F.2d 441 (7 Cir. 1931) citing numerous cases; Anderson v. Condict, 93 Fed. 349, 354 (7 Cir. 1899); see also Valdes v. Feliciano, 267 F.2d 91, 95 (1 Cir. 1959).

titled to be treated as administrative expenses, but were included in § 64a(4). The opinion of the court stated that "it is preferable to isolate from Section 64, sub.a(1), as falling without a meaningful view of costs and expenses of administration, those expenses which, though they can be considered post-bankruptcy items, are unrelated to development, preservation or distribution of the bankrupt's assets." (p. 102) But that statement must be read in the light of the critical point, which the court emphasized, that priority would have been accorded the taxes if they had accrued after the filing of the petition, because in such case they would have been a "cost of protecting the fund". (p. 100) A tort claim similarly is entitled to priority; it is as much an expense of management or "development" of the estate as is a tax claim.[9]

Finding no expression in the statute to the contrary, but rather sufficient authority in its language to include the present claim, I would not recoil from doing so because it is based on a tort. I would follow the terse and specific dictum of Judge Learned Hand that "the liquidation of the lessee's resulting damages [from the trustee's negligence] was as much a part of the usual administration in bankruptcy, as that of the pay of accountants, custodians or other assistants, employed by the trustee." *Vass v. Conron Bros. Co.*, 59 F.2d 969, 971 (2 Cir. 1932).

Judges Smith and Seitz concur in this dissent.

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[9] Guerin v. Weil, Gotshal & Manges, 205 F.2d 302 (2 Cir. 1953), cited by the majority, does not govern here, and in any event, its disallowance of the expenses of petitioning creditors for the service of attorneys and accountants was overturned by Congress in 1962, Pub. L. 87-681. See S.Rep. No. 1954, 87th Cong., 2d Sess. (1962), 1962-2 U.S. Code, Cong. & Adm. News 2603, 2608.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,507

In the Matter of
I. J. KNIGHT REALTY CORP., *Bankrupt*

READING COMPANY, *Claimant, Appellant*

(D. C. Bankruptcy No. 27540)

On appeal from the United States District Court for the Eastern District of Pennsylvania

Present: STALEY, *Chief Judge*, and MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 9, 1965, be, and the same is hereby affirmed.

Attest:

THOMAS F. QUINN
Clerk

January 6, 1967

Supreme Court of the United States

October Term, 1967

No. 127

READING COMPANY, *Petitioner*

v.

FRANCIS SHUNK BROWN, 3RD, etc., et al.

ORDER ALLOWING CERTIORARI

Filed October 16, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

CERTIFICATE OF SERVICE

STATE OF PENNSYLVANIA :
SS.
COUNTY OF PHILADELPHIA :

I, THOMAS RAEBURN WHITE, JR., counsel for the petitioner herein, and attorney of record for the petitioner in the courts below, state that on the 29th day of November, 1967, I served five copies of the foregoing Record Appendix on the respondents, as required by Rule 33, by personally mailing said copies hereof to Messrs. Dechert, Price and Rhoads, in care of their office, 1600 Three Penn Center Plaza, Philadelphia, Pennsylvania 19102 and on the United States by mailing five copies to the Solicitor General, Department of Justice, Washington 25, D. C., and to Richard M. Roberts, Assistant Attorney General, Department of Justice, Washington, D. C. 20530, the attorney who argued the brief for the United States in the courts below.

THOMAS RAEBURN WHITE, JR.
Member of the Bar of the
United States Supreme Court